

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

NATIONAL LABOR RELATIONS BOARD,

Applicant

v.

Case No. 16-mc-00019-GKF

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 627

Respondent

**MEMORANDUM IN SUPPORT OF APPLICATION OF THE NATIONAL LABOR
RELATIONS BOARD FOR AN ORDER REQUIRING COMPLIANCE WITH
INVESTIGATIVE SUBPOENA**

The National Labor Relations Board, (the “Board”), an administrative agency of the Federal Government, having made an Application for an order requiring compliance with a subpoena duces tecum served on Respondent International Union of Operating Engineers, Local 627 (“IUOE Local 627”), submits this memorandum in support of that application.

FACTS

The relevant facts concerning the failure of Respondent IUOE Local 627 to produce requested documents and provide written answers to interrogatories, in response to the administrative subpoena served upon it, are set forth in the Board’s Application and exhibits attached thereto and are incorporated herein by reference. To date, Respondent has failed to provide the requested documents or provide any written answers to interrogatories.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO GRANT THE BOARD'S APPLICATION FOR SUBPOENA ENFORCEMENT

Section 11(1) of the National Labor Relations Act (the "Act"), 29 U.S.C. §161(1), grants statutory authority to the Board for the exercise of subpoena power. That section states, in relevant part:

The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. *The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceedings or investigation requested in such application.*

Id. (italics added); see *Perdue Farms, Inc., Cookin' Good Div. v. NLRB*, 144 F.3d 830, 834 (D.C. Cir. 1998); *NLRB v. Carolina Food Processors*, 81 F.3d 507, 511 (4th Cir. 1996).

Section 11(2) of the Act, 29 U.S.C. §161(2), empowers the United States district courts to enforce Board subpoenas. That section states, in pertinent part:

In case of contumacy or refusal to obey a subpoena issued to any person, any district court of the United States or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

See Cudahy Packing Co. v. NLRB, 117 F.2d 692, 693 (10th Cir. 1941) (referring to the language of Section 11(2) as setting forth the applicable legal standard for enforcement of a Board subpoena).

In the instant case, the Board's Contempt, Compliance, and Special Litigation Branch is investigating whether IUOE Local 627 complied with a Judgment of the United States Court of Appeals for the Tenth Circuit entered on December 3, 2015, enforcing a Decision and Order of the Board (reported at 361 NLRB No. 93) issued on November 5, 2014. IUOE Local 627 operates a hiring hall in Tulsa, Oklahoma, and did so at all material times in this case. Therefore, IUOE Local 627 "is found" and "transacts business" within this judicial district, and this Court has jurisdiction under Section 11(2) of the Act to order IUOE Local 627 to comply with the subpoena.

II. THE BOARD'S APPLICATION FOR SUMMARY ENFORCEMENT OF ITS SUBPOENA IS APPROPRIATE

Subpoena enforcement proceedings, as authorized by Section 11(2) of the Act, are summary in nature. *See NLRB v. Frazier*, 966 F.2d 812, 817 (3d Cir. 1992); *NLRB v. N. Am. Van Lines, Inc.*, 611 F. Supp. 760, 763 (N.D. Ind. 1985) (citing *NLRB v. G.H.R. Energy Corp.*, 707 F.2d 110, 113 (5th Cir. 1982)). It is well-established that in a Section 11(2) enforcement case, the district court should treat the Board's application as a dispositive matter, and not as a pre-trial discovery matter. *Frazier*, 966 F.2d at 817-18; *see also NLRB v. Interstate Dress Carriers, Inc.*, 610 F.2d 99, 112 (3d Cir. 1970) ("Otherwise the enforcement proceeding may become a means for thwarting the expeditious discharge of the agency's responsibilities.").

Furthermore, Section 11(2) dispenses with the formalities of a complaint and summons. Instead, it specifically authorizes the Board to make an "application" to the district courts for a summary disposition on the sole issue of whether or not to enforce a Board subpoena. *Cudahy Packing*, 117 F.2d at 694 ("The Company's contention that a suit to enforce obedience to a subpoena must be begun by the filing of a complaint and issuance of process is not borne out by

the act.”); *see also* *NLRB v. Dutch Boy, Inc., Glow Lite Div.*, 606 F.2d 929, 932 (10th Cir. 1979) (citing *Cudahy Packing* in stating that Board subpoenas “are to be enforced by a district court upon application of the Board”). As explained long ago by the Sixth Circuit in *Goodyear Tire & Rubber Co. v. NLRB*, 122 F.2d 450, 451 (6th Cir. 1941), in a case challenging the Board’s failure to serve a summons and complaint in a subpoena enforcement proceeding:

[T]he proceedings plainly are of a summary nature not requiring the issuance of process, hearing, findings of fact, and the elaborate process of a civil suit. We think the procedure to be followed in the district court is controlled by Section 11(2) of the Act...

It is significant that the statute calls for an “application” rather than a petition, an “order” rather than a judgment, and that it details no other procedural steps. Obviously, if the enforcement of valid subpoenas, the issuance of which is a mere incidence in a case, were to require all of the formalities of a civil suit, the administrative work of the Board might often be subject to great delay. We think that such was not the intention of Congress.

Accordingly, the Board’s application to this Court seeking enforcement of the subpoena issued to Respondent IUOE Local 627 is appropriate.

III. THE EVIDENCE SOUGHT RELATES TO OR TOUCHES THE MATTER UNDER INVESTIGATION AND RESPONDENT HAS NOT SHOWN IT TO BE UNDULY BURDENSOME

Subpoenas issued by the Board are subject to limited judicial review. “The only limitation upon the power of the [NLRB] to compel the production of documentary or oral evidence is that it must relate to or touch upon the matter under investigation or in question.” *Cudahy Packing*, 117 F.2d at 694; *see also* *NLRB v. Midwest Heating & Air Conditioning*, 528 F. Supp. 2d 1172, 1178 (D. Kan. 2007), *objections overruled*, 251 F.R.D. 622 (D. Kan. 2008) (citing *Dutch Boy*, 606 F.2d at 933). Thus, a district court “may inquire only to ascertain that a proceeding is pending before the Board of which it has jurisdiction and that the evidence sought relates to or touches the matter under investigation.” *Cudahy Packing*, 117 F.2d at 694.

The burden on a party to evade compliance with a subpoena is not a meager one. *Midwest Heating & Air*, 528 F. Supp. 2d at 1179; *NLRB v. N. Bay Plumbing, Inc.*, 102 F.3d 1005, 1008 (9th Cir. 1996); *Interstate Dress Carriers*, 610 F.2d at 112. A subpoenaed party must show that the subpoena “is plainly incompetent or irrelevant to any lawful purpose” of the administrative agency. *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943). A party is not excused from compliance with a valid subpoena unless it demonstrates that “compliance would unduly disrupt and seriously hinder normal operations of the business.” *EEOC v. Citicorp Diners Club, Inc.*, 985 F.2d 1036, 1040 (10th Cir. 1993) (citing *EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 477 (4th Cir. 1986), *cert. denied*, 479 U.S. 815 (1986)).

In the instant case, the subpoena duces tecum served on Respondent on May 17, 2016, by overnight mail, required that IUOE Local 627 produce documents necessary to calculate the backpay owed to Ms. Loerwald under the Tenth Circuit’s Judgment and documents showing proof that Respondent had posted the proper remedial notice. (Exhibit J). In addition, the subpoena propounded interrogatories to determine the extent of Respondent’s compliance with the affirmative provisions of the Tenth Circuit’s Judgment as well as Respondent’s methodology in computing the backpay reflected in the check it had previously tendered to the Board. This evidence clearly “relates to and touches upon” a matter under investigation – the degree of Respondent’s compliance with the Tenth Circuit’s Judgment of December 3, 2015.¹

Furthermore, Respondent does not seriously argue that compliance with the subpoena would impose an undue burden. In its Petition to Revoke the subpoena filed with the Board,

¹ As the Board’s August 10, 2016 Order denying Respondent’s Petition to Revoke makes clear, the Respondent need not provide any material already produced, provided that Respondent accurately describe which documents under subpoena have already been provided, state whether those documents constitute all of the requested documents, and provide all of the information that was subpoenaed.

Respondent only offered cursory claims that the evidence sought is not “specific” and the request is “an oppressive and harassing tactic.” (Exhibit L at 1, 3). These conclusory statements do not come close to showing that compliance with the subpoena would “unduly disrupt and seriously hinder normal operations.” *Citicorp Diners Club*, 985 F.2d at 1040.

IV. THE BOARD IS ENTITLED TO REIMBURSEMENT FOR COSTS INCURRED INITIATING AND PROSECUTING THIS SUBPOENA ENFORCEMENT ACTION

IUOE Local 627 has interposed no legitimate objection to obedience with the subpoena. Under these circumstances, the Board is entitled to an award of costs and attorneys’ fees incurred in initiating and prosecuting this subpoena enforcement action. *See NLRB v. Cable Car Advertisers*, 319 F. Supp. 2d 991, 999-1001 (N.D. Cal. 2004); *NLRB v. Coughlin*, 176 LRRM 3197, 3202 (S.D. Ill. 2005); *NLRB v. AGF Sports, Ltd.*, 146 LRRM 3022, 3024 (E.D.N.Y. 1994); *NLRB v. Baywatch Security and Investigations*, No. H-04-220, 2005 WL 1155109, at *3 (S.D. Tex. April 28, 2005).

Such a remedy is emphatically appropriate here. IUOE Local 627 has failed, for over eight months and despite numerous requests by Board personnel, to provide sufficient proof of its compliance with the Tenth Circuit Judgment. In fact, Respondent has stubbornly refused to respond to any letters, phone calls, or emails from Board personnel, instead obstructing the Board’s efforts to ensure compliance for no apparent reason other than for the sake of doing so. Inordinate time and effort has been wasted, at taxpayer expense, attempting to secure the necessary evidence. Respondent has offered nothing in response to the Board’s efforts except frivolous legal arguments and specious claims of harassment unsupported by record evidence. Under these circumstances, the Board should be awarded the fees and costs associated with bringing this subpoena enforcement action.

CONCLUSION

For the reasons set forth above, the Board respectfully requests that this Court enter an order requiring Respondent IUOE Local 627 to fully comply with Subpoena Duces Tecum B-1-RIXX41 and requiring that Respondent reimburse the Board for costs and attorneys' fees incurred in initiating and prosecuting this subpoena enforcement action.

Respectfully submitted,

NATIONAL LABOR RELATIONS BOARD

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